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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANA BERENICE PALOS-MONTES, Defendant(s).	Criminal Case No. 08CR1726-LAB DATE: August 22, 2008 TIME: 2:30 p.m.. COURTROOM: 9 Before Honorable Larry A. Burns UNITED STATES' RESPONSE TO DEFENDANT'S MOTIONS *IN LIMINE* TO: (1) PRECLUDE EVIDENCE UNDER 404(B); (2) GRANT ATTORNEY CONDUCTED VOIR DIRE; (3) EXCLUDE 403 EVIDENCE; (4) PRECLUDE EXPERT TESTIMONY; (5) PROHIBIT STREET VALUE TESTIMONY; (6) EXCLUDE EVIDENCE OF STRUCTURE; (7) PRECLUDE COCAINE FROM COURTROOM; (8) ORDER PRODUCTION OF SUPPLEMENTAL REPORTS AND TECS; (9) COMPEL THE GOVERNMENT TO ESTABLISH CHAIN OF CUSTODY; (10) SUPPRESS STATEMENTS; TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Aaron B. Clark, Assistant U.S. Attorney, and hereby files its Response to Defendant's Motions *in Limine* in the above-captioned case. Said Response is based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF FACTS

The Government hereby incorporates by reference the Statement of Facts included in its motions *in limine* filed on August 18, 2008.

III

DEFENDANT'S MOTIONS IN LIMINE

A. Preclude Evidence Under 404(b)

As described in the Government's motions *in limine*, the Government will introduce evidence under Federal Rule of Evidence 404(b) regarding Defendant's prior crossings in the load vehicle, specifically those prior trips that Defendant admitted to in her post-Miranda statement. These crossings began the month prior to Defendant's apprehension. The Government provided notice of its intent to introduce this evidence in a letter dated August 15, 2008 and, on the same date, produced TECS information regarding those crossings, as well as a supplemental report of an interview with Antonia Franco-Nunez regarding statements Defendant made in connection with those prior crossings. Defendant's motion is therefore moot.

B. Grant Attorney Conducted Voir Dire

The Government defers to the Court's usual practice on this issue.

C. Exclude 403 Evidence

The Government does not intend to introduce into evidence any post-arrest photos of Defendant. Additionally, the Government does not intend to introduce evidence of Defendant's demeanor, including any nervousness, during the stop of her vehicle. Hence, the Court should deny the motion as moot. In any event, the motion fails on the merits.

Evidence regarding a defendant's demeanor and physical appearance is admissible as circumstantial evidence that is relevant to the jury's determination as to whether a defendant knew contraband was concealed in the vehicle. See, e.g., United States v. Romero-Avila, 210 F.3d 1017, 1023 (9th Cir. 2000) (identifying defendant's nervousness at the border as part of the "strong independent evidence of defendant's guilt"); United States v. Hursh, 217 F3d. 761, 767-68 (9th Cir. 2000) (nervousness during border questioning at primary inspection and later nervousness while car was being inspected at secondary was additional evidence of knowledge); United States v. Klimavicius-Viloria, 144 F. 3d 1249, 1263-65 (9th Cir. 1998) (crew's demeanor, such as becoming less cooperative when the Coast Guard decided to search a tank where bales of cocaine were later found, was relevant to show knowing participation); United States v. Fuentes-Cariaga, 209 F.3d 1140, 1144 (9th Cir. 2000) (it is within the ordinary province of jurors to draw inferences from facts such as a defendant's nervousness at Calexico port of entry); United States v. Barbosa, 906 F.2d1366, 1368 (9th Cir. 1990) (jury could infer guilty knowledge from a defendant's apparent nervousness and anxiety during airport inspection); United States v. Lui, 941 F.2d 844, 848 n.2 (9th Cir. 1991) (jury could consider guilty knowledge from a defendant's acting disinterested during airport inspection); United States v. Walitwarangkul, 808 F.2d 1352, 1354 (9th Cir. 1987) (affirming conviction for possession of narcotics with intent to distribute where, inter alia, defendant "appeared nervous when questioned by customs").

D. Preclude Expert Testimony

The Government here incorporates by reference its own motion *in limine* with respect to this issue.

E. Exclude Testimony Regarding the Value of the Narcotics and Structure Evidence

The Government here incorporates by reference its own motion *in limine* regarding the relevance and admissibility of the drug value expert in this case.

F. Preclude Cocaine from the Courtroom

The Government here incorporates by reference its own motion *in limine* with respect to this issue.

G. Order Production of Supplemental Reports and TECS

The Government has produced TECS information for the load vehicle for prior crossings between March and April 2008, as well as TECS information for the prior crossings of Defendant and Franco. In this regard, Defendant's Motion is moot.

Defendant additionally seeks to compel production of any "supplemental reports" pursuant to Rule 16. Of course, Federal Rule of Criminal Procedure Rule 16(a)(2) specifically exempts such reports from discovery and inspection. Notwithstanding this exemption, however, the Government has already produced several reports related to Defendant's case. Furthermore, to the extent any additional reports contain Jenks material, the Government will disclose those statements in advance of trial. The motion should therefore be denied.

H. Compel the Government to Establish Chain of Custody

The Government here incorporates by reference its own motion *in limine* with respect to this issue.

I. Suppress Statements

As with his prior motion in this regard, Defendant still does not support his motion with the required declaration, nor does he even allege any specific facts at issue. CrimLR 47.1(g). The Court originally denied this motion on that basis and should do so again. Based on the Statement of Facts attached to the Complaint in this case, that Defendant's statements were voluntary and given in accordance with Miranda. See United States v. Batiste, 868 F.2d 1089, 1092 (9th Cir. 1989) (government proffer based on the statement of facts attached to the complaint is alone adequate to defeat a motion to suppress where the defense fails to adduce specific and material facts).

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IV

CONCLUSION

For the foregoing reasons, Defendant's motions, except where unopposed, should be denied.

DATED: August 20, 2008.

Respectfully submitted,
KAREN P. HEWITT
United States Attorney

s/ Aaron B. Clark
AARON B. CLARK
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff v. ANA BERENICE PALOS-MONTES, Defendant(s).	Case No. 08CR1726-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, AARON B. CLARK, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of UNITED STATES' RESPONSE TO DEFENDANT'S MOTIONS *IN LIMINE* on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Michelle Betancourt, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 20, 2008.

s/ Aaron B. Clark
AARON B. CLARK